United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7215

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAY BLUM,

Plaintiff—Appellant

v.

PROBATE COURT OF CHITTENDEN COUNTY, VERMONT, et al.

Defendants—Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF VERMONT

Civil Action No. 76 - 130

BRIEF OF DEFENDANT — APPELLEE JOSEPH HANDY, Commissioner, Department of Social and Rehabilitation Services

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I. STATEMENT OF THE ISSUES

A. Should the action be dismissed as to defendant Handy because the complaint fails to state a claim upon which relief can be granted.

1. Is defendant Handy required to give full faith and credit to a final order of a court of another state.

2. Can defendant Handy be held liable in a civil rights action for conduct which was authorized by law and for the alleged deprivation of rights in which he did not personally participate.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is a civil rights action filed pursuant to the provisions of 42 U.S.C. §1983 and 28 U.S.C. §2241, with jurisdiction based on 28 U.S.C. §1343(3). The complaint filed on behalf of Jay Blum was filed on June 11, 1976. On June 22, 1976, the complaint was amended because the plaintiff had mistakenly filed the action against the Commissioner of Social Welfare rather than the Commissioner of Social and Rehabilitation Services. Accordingly, defendant Handy was substituted as a party for defendant Philbrook. The plaintiff sought declaratory relief based on the claim that defendant Handy violated his Fourteenth Amendment rights by consenting to the adoption of plaintiff's son.

On December 21, 1976, the plaintiff was again permitted to amend his complaint. On that same day the court heard arguments in support of the other defendants' motions to dismiss, and in support of plaintiff's attorney's motion to withdraw as counsel. The court denied the motion to withdraw and took the other motions under advisement. Defendant Handy was permitted to make argument that day and subsequently on January 17, 1977, he filed a motion to dismiss. In an opinion and order dated February 22, 1977, the court dismissed the action against all defendants on the

ground that the complaint failed to state a claim upon which relief could be granted.

The plaintiff on March 4, 1977 filed a motion to amend findings and judgment. Subsequently, on April 18, 1977, the plaintiff requested the court to consider his March 4, 1977 motion as a motion to alter or amend judgment. The court in an opinion and order dated April 21, 1977 denied the motion to alter or amend.

On March 15, 1977, the plaintiff's attorney again moved to withdraw as counsel. The court granted this motion on March 28, 1977.

The plaintiff filed two separate appeals in this case. On March 21, 1977 he appealed the court's order of February 22, 1977 dismissing the action; and on May 15, 1977 he appealed the court's order of April 21, 1977 denying the motion to amend judgment. Pursuant to plaintiff's motion of June 20, 1977, the two appeals were consolidated.

B. The Facts

Because the court dismissed the action in response to motions filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, no evidence was taken and no findings of fact were made. However, the facts can be gleaned from the complaint as amended on December 21, 1976.

The plaintiff, Jay Blum, and his wife were married in Massachusetts on February 17, 1967. A son, Nathan David

Dan-Israel Blum (hereinafter referred to as Dan Blum) was born to the couple on September 30, 1968. Shortly thereafter, the plaintiff's wife committed suicide and on November 14, 1972, the plaintiff placed Dan Blum in the Avon Home, a licensed child placement agency. During the period from December, 1972 through February 15, 1973, the plaintiff voluntarily admitted himself to two mental hospitals in Massachusetts.

On March 6, 1973, the Avon Home petitioned the Middlesex County Probate Court to appoint the agency as guardian. This petition was granted and on November 27, 1973, Cambridge Family and Children's Services, successor to the Avon Home, filed a petition with the probate court to place Dan Blum for adoption without the consent of the plaintiff. The plaintiff was served with notice, and a copy of the petition; and was represented by counsel. The hearing on the petition was scheduled for April 4, 1974, but the plaintiff failed to appear at the court. Upon the plaintiff's failure to appear, his attorney withdrew his appearance from the case.

Sometime in April, 1974, the plaintiff attempted, but failed, to kidnap Dan Blum. After this attempt, he left for Israel and did not return until January, 1975.

On August 29, 1974, the Middlesex Probate Court issued an order which permitted the adoption of Dan Blum to proceed without the plaintiff's consent. The plaintiff's

counsel, on March 22, 1975, petitioned the Massachusetts Supreme Judicial Court for permission for a late appeal with respect to the probate court's order of August 29, 1974. This petition was denied in August of 1975.

On May 5, 1975, the Cambridge Family and Children's Services transferred custody of Dan Blum to the Vermont Department of Social and Rehabilitation Services. Defendant Handy, the commissioner of the latter department, then consented to the adoption of Dan Blum by Dale and Jeanne Goldhaber of Burlington, Vermont. An adoption decree was issued by the Honorable L. John Cain of the Chittenden County Probate Court on May 5, 1975.

III. ARGUMENT

A. The plaintiff's complaint failed to state a claim upon which relief could be granted in that the defendant was required to give full faith and credit to the order of the Massachusetts probate court.

The only claim made by the plaintiff against defendant Handy appears in paragraph thirty-three of the complaint. That paragraph provides:

> (33) In consenting to the adoption of Dan Blum pursuant to the unconstitutionally-obtained authority of the Middlesex Probate Court, Defendant Joseph Handy violated the Fourteenth Amendment to the Constitution of the United States.

Commissioner Handy consented to the adoption of Dan Blum only after receiving a copy of an order from the Middlesex County Probate Court (page A of addendum)[1]. The order indicated that Jay Blum, the father of Dan Blum, had received due notice of the petition and that he had withdrawn his objection to the petition. In addition, the order decreed that the adoption of Dan Blum as sponsored by the Cambridge Family and Children's Services could proceed without the consent of and notice to Jay Blum. In the lower right hand corner of the copy of the order

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[1]The defendant would have requested that this document be made a part of the appendix. However, the appendix was filed without the defendant having an opportunity to agree on its contents as provided under Rule 30 of the Federal Rules of Appellate Procedure.

the Assistant Register of the probate court of Massachusetts certified on October 4, 1974 that the copy was a true copy.

To hold defendant Handy liable for his act of consenting to the adoption of plaintiff's child would be contrary to the purpose of the Full Faith and Credit Clause of the Constitution of the United States (Article 4 §1):

> Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.

The purpose of this clause is to preserve the rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states. Pink v. A.A.A. Highway Express, 314 U.S. 201, 210 (1941); Sutton v. Leib, 342 U.S. 402, 407 (1951); Pearson v. Northeast Airlines, 307 F. 2d 131, 133 (2nd Cir. 1962). Accordingly, the judgments of the courts of one state must be given full faith and credit in the courts of another state.

Defendant Handy, a lay person, could not have been expected to question the validity of the Massachusetts probate court order when that order was entitled to full faith and credit in the courts of Vermont. If he were unable to accept the finality of judgments obtained in other states, Commissioner Handy would never be able to consent to adoptions of children coming to Vermont from other states without relitigating the issues concerning parental rights. Such a situation would be intolerably cumbersome and would effectively preclude adoptions of out-of-state children.

The plaintiff maintains, however, that his due process rights were violated in Massachusetts and that therefore the full faith and credit clause is inapplicable. In particular he challenges the sufficiency of the notice received for the hearing on the petition to dispense with his consent to adoption. Indeed the Supreme Court has stated:

> A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. Griffin v. Griffin, 327 U.S. 220, 228 (1946).

But the Griffin case is not dispositive of the full faith and credit issue in the instant case. In an earlier decision, Milliken v. Meyer, 311 U.S. 457, 462 (1940), the court held that when a judgment on its face appears to be that of a court with jurisdiction of the case, such jurisdiction is presumed unless disproved by extrinsic evidence. Failure to disprove the presumption of jurisdiction precludes an inquiry into the merits of the action upon which the judgment is based.

An examination of the Massachusetts probate court order in question demonstrates that Commissioner Handy acted appropriately when he relied on that order. In fact, he would have been remiss in his duties if he failed to give his consent to adoption after receiving the Massachusetts probate court order. The order is certified as a true copy by the register of the court. On its face it indicates that the plaintiff had notice of the hearing and had withdrawn his objection to the petition. Commissioner Handy would have no reason to suspect

that the order was either improper or based on an unconstitutional proceeding. Moreover, as a lay person he could not be expected to have the expertise to evaluate the constitutional basis of the order. In short, Commissioner Handy had to presume the validity of the Massachusetts probate court order.[2]

In addition, it appears that the plaintiff's due process rights were not violated in Massachusetts. Although the plaintiff amended his complaint to allege that he either received insufficient or no notice of the hearing dispensing with his consent, the unaltered allegations of the complaint belie this. The plaintiff was served with notice and a petition, and he was represented by counsel (Paragraphs eleven and twelve of the amended complaint). The petition (see copy attached to the plaintiff's complaint) stated the purpose of the hearing and the issues involved. A hearing was scheduled but the plaintiff did not appear at least partially on his psychiatrist's advice

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[2]Generally a "full faith and credit" issue arises when a party seeks to enforce against another party a judgment obtained in another state. (See Griffin v. Griffin, supra and May v. Anderson, 345 U.S. 528 (1953)). A court presented with such an issue has an opportunity to decide the matter after hearing from both sides of the case. Thus the adversarial process enables the court to determine whether the judgment was obtained in violation of the due process clause. In the instant case, Commissioner Handy did not have that opportunity as there was no party before him to raise the issue. It would be an unusual result if the law were to require a lay person to raise the issue himself.

(Paragraph fourteen of the amended complaint). Although the plaintiff did not appear at the hearing, his attorney did appear and he withdrew from the case (Paragraph fifteen of the amended complaint). Based on these facts, the notice received by the petitioner was sufficient under the test set out in Mullane v. Central Hanover Tr. Co.. 339 U.S. 306, 314 (1950). The court held that notice was sufficient if it was

> * * * reasonably calculated under all the circumstances to appraise the interested parties of the pendency of the action and afford them an opportunity to present their objections.

The plaintiff relies heavily on the case of Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975) to demonstrate that he was denied due process in the Massachusetts court proceeding. The court in Alsager did find that notice similar to that which was given in this case was inadequate and violative of due process. However, the facts in the instant case demonstrate that any prejudice to the plaintiff was caused by his own actions. He was aware of the pendency of the proceedings yet he chose to ignore them, to attempt self-help and to leave the country.

B. The complaint failed to state a claim upon which relief could be granted in that defendant Handy did not personally participate in the alleged deprivation of rights, and in that his conduct was authorized by statute.

Even assuming that the Massachusetts court order was not entitled to full faith and credit in Vermont, the plaintiff has failed to state an actionable claim with respect to defendant Handy. The plaintiff filed this action pursuant to 42 U.S.C. §1983. That section provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added)

In instituting the action the plaintiff sought relief from an alleged deprivation of rights caused by the termination of the parental relationship which existed between the plaintiff and his child. (Paragraph two of the amended complaint).

An essential element of a civil rights claim brought pursuant to 42 U.S.C. §1983 is that the defendant has directly or personally participated in the alleged deprivation of constitutional rights. Hesselgesser v. Reilly, 440 F.2d 901, 902 (9th Cir. 1971); Needleman v. Bohlen, 386 F. Supp. 741, 747 (D. Mass. 1974); Fowler v. Anderson, 386 F. Supp. 411, 413 (E. D. Okl. 1974); Vanderzanden v. Lowell, 369 F. Supp. 67, 75 (D. Or. 1973); Bennett v. Gravelle, 323 F. Supp. 203, 214

(D. Md. 1971) aff'd 451 F. 2d 1011; petition for cert. dismissed 407 U.S. 917; Boreta v. Kirby, 328 F. Supp. 670, 674 (N. D. Cal. 1971) aff'd 485 F. 2d 582 (9th Cir). However, the complaint in the instant case demonstrates that the termination of plaintiff's parental rights (the alleged deprivation of rights) was ordered by the Middlesex, Massachusetts Probate Court (Paragraph nineteen of the amended complaint). Moreover, the complaint indicates that defendant Handy's only involvement in this matter was that he consented to the adoption of the plaintiff's child in Vermont (Paragraph twenty-two of the amended complaint). Since defendant Handy, by plaintiff's own admission, neither participated in the decision to terminate plaintiff's parental rights nor engaged in any conduct leading to that termination, there can be no finding that defendant Handy "subjected or caused to be subjected" the plaintiff to the deprivation of any rights.[3]

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[3]It is on this point that Alsager, supra is instructive. The case was similar to the instant case in that it was a civil rights action alleging that the Alsager's parental rights were terminated by the court in violation of their rights to substantive and procedural due process. However, the Alsagers filed their action against the court which actually terminated their rights. Additionally the action was filed in the United States district court having within its jurisdiction the court which deprived them of their rights. In contrast, plaintiff Blum has filed an action in Vermont to remedy an alleged deprivation of rights which was brought about by a Massachusetts court.

Moreover, Commissioner Handy's act of consenting to the adoption of the plaintiff's child was authorized by statute. 15 V.S.A. §435 provides in pertinent part:

> Except as hereinafter otherwise provided, if the person to be adopted is a minor, consent to the adoption shall be given, and the final adoption decree executed on the part of the minor, by both of his parents or by the surviving or sole parent. Such consent and decree shall be sufficient when given and executed:
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> * * *
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> (6) By the department of social and rehabilitation services of this state or its counterpart in another state, if the minor has been committed to the care and custody of such department by a court of competent jurisdiction without limitation in respect of adoption, or if the minor has been relinquished to it in accordance with applicable state law;
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> * * *
>
> (10) By the department of social and rehabilitation services when so authorized by a public agency or licensed child placing agency of another state having jurisdiction of a child whose adoptive parents are residing in Vermont.

It is axiomatic that one has no constitutional remedy against the lawful conduct of another. Senn v. Tile Layers Union, 301 U.S. 468, 483 (1937); Garren v. City of Winston-Salem, 463 F.2d 54, 57 (4th Cir. 1972) cert. denied 409 U.S. 1039. The custody of Dan Blum was transferred to Commissioner Handy for adoption purposes. As he is authorized to do by the statute, he consented to the adoption of the child. There are no allegations that 15 V.S.A. §435 is unconstitutional or that the Commissioner violated its terms. Accordingly, an action against Commissioner Handy does not lie under 42 U.S.C. §1983.

IV. CONCLUSION

The gravamen of the plaintiff's complaint is that his constitutional rights were violated in the proceeding in the Middlesex County Probate Court. He alleges that the Massachusetts court order was based on an unconstitutional Massachusetts statute and that the probate court violated both his procedural and substantive due process rights. The perplexing question then, is why is this case being prosecuted against a Vermont defendant in a Vermont court. Defendant Handy's only action in the matter was to rely on a foreign judgment which the plaintiff alleges was unconstitutionally obtained. Such reliance on the Massachusetts order was mandated by the Full Faith and Credit Clause and by public policy considerations. Moreover, such reliance neither subjected the plaintiff nor caused him to be subjected to a deprivation of his civil rights. Any deprivation of rights antedated Commissioner Handy's involvement in the case. Accordingly, the court should affirm the district court's dismissal of the action against defendant Handy.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Probate Court

At a Probate Court held at Cambridge in and for said County of Middlesex, on the twenty-ninth day of August in the year of our Lord one thousand nine hundred and seventy-four

On the petition of the Cambridge Family and Children's Services

praying that said Court establish under the provisions of General Laws, Chapter 210, Section 3 as most recently amended by Chapter 800 of the Acts of 1972, whether or not the consent of or notice to Jay F. Blum shall be required upon a petition for the adoption of Nathan David Dan-Israel Blum sponsored by the Cambridge Family and Children's Services.

Jay F. Blum having had due notice of said petition and no objection being made thereto; now being withdrawn

and it appearing to the Court reasonable and proper that the prayer of said petition should be granted.

It is decreed that after a hearing the consent of and notice to said Jay F. Blum will not be required upon a petition for the adoption of said Nathan David Dan-Israel Blum sponsored by the Cambridge Family and Children's Services.

Judge of Probate Court.

Middlesex S. October 4, 1974
Probate Court

Register

CERTIFICATE OF SERVICE

I, DAVID H. GREENBERG, hereby certify that I have served a copy of the foregoing BRIEF OF DEFENDANT APPELLEE - JOSEPH HANDY, upon the following on this 28th day of November, 1977:

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